

DEATH BENEFIT NOMINATIONS - FAQs

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FREQUENTLY ASKED QUESTIONS

Please note that these FAQ'S only relate to death benefit nominations generally and may not apply if the rules of your particular fund say something different. It is always wise to check your fund's rules.

Q1. What is a death benefit nomination?

It is a direction to the trustee of the superannuation fund as to how your fund super benefit is to be allocated after your death. On your death, your benefit must be allocated to or amongst your dependants or to your estate.

The direction can be a binding nomination or a non-binding nomination.

A binding nomination binds the trustee (so the trustee must comply with the nomination) while a non-binding nomination provides the trustee with information as to how you would like your super benefits to be allocated which the trustee can consider (but need not follow) when making its allocation decision.

Q2. Must a member make a death benefit nomination?

There is no requirement that a member make a death benefit nomination. The member may make a death benefit nomination and may at any time revoke or change that nomination.

Q4. Do I need to make a death benefit nomination?

This is purely a decision for the member. If you do not make a death benefit nomination then the trustee of your SMSF will decide whether to pay your benefits to your deceased estate or to your dependents and in what proportions, on your death.

Q5. What are my options?

Effectively there are three: not making a death benefit nomination; making a binding death benefit nomination, or making a non-binding death benefit nomination.

Q6. Which option should I take?

This is really a question that should be answered as part of your estate planning. In many cases careful consideration needs to be given to what is likely to happen to all that you own or have an interest in on your death, and how you provide for your family. Interests in superannuation are a part of that and it could be that a binding nomination should form a key part of your carefully developed holistic estate plan.

Q7. In which way is a binding nomination different from a non-binding nomination?

A binding nomination obliges the trustee to pay your benefits in amounts and proportions you specify.

If you make a non binding nomination, or if you make no death benefit nomination, the trustee will decide who will take your benefits on your death.

A binding nomination adds certainty to who will receive your superannuation benefits, if that is what you want.

Q8. So, if the trustee will decide who will take my benefits, why bother making a non-binding nomination?

A non binding nomination is your opportunity to let the trustee (who makes the decision unless you make a binding nomination) know who you would prefer to take your benefits. If a surviving spouse is the trustee and your choice is to leave 100% of your benefits to your surviving spouse then the trustee/surviving spouse may be greatly aided and directed by your non binding nomination.

Q9. Do I need to use a particular type of form to make a binding nomination or a non-binding nomination?

You must check the rules of your fund to see if those rules specify or stipulate the form of a nomination. Generally a death benefit nomination must:

- (a) be in writing;
- (b) be signed and dated;
- (c) sufficiently and clearly deal with relevant issues; and
- (d) be given to and accepted by the trustee of your SMSF.

A deficient death benefit nomination cannot be rectified after your death. It is advisable to have the document witnessed by at least one adult who is likely to survive you. Although the superannuation regulations may require two witnesses those regulations do not apply to self managed funds.

Q10. Can I nominate anybody to receive my benefits in my SMSF in the event of my death?

No. Only your dependants or your deceased estate are eligible to receive your benefits. Your dependants are:

- (a) your spouse, including a de facto or same-sex spouse;
- (b) any of your children (including adopted children, step children and ex-nuptial children);
- (c) any child of your spouse (including adopted children, step children and ex-nuptial children);
- (d) any individual who is financially dependent on you at the time of your death; and

- (e) any individual who is in an “interdependency relationship” with you at the time of your death.

Q11. Can I nominate grandchildren?

Generally no, unless they fall into one of the other categories. So if your grandchildren were financially dependent upon you or they are in an interdependency relationship with you then your grandchildren will qualify as your dependants and so could be nominated. Some financial or domestic dependence on you by a grandchild would need to be evident. You may want to consider implementing strategies to ensure they qualify. Alternatively, they can take your benefits as beneficiaries of your deceased estate if your benefits are paid to your estate.

Q12. What happens if I nominate adult children rather than my spouse?

Although adult children are permissible dependants whom you can nominate, adult children are generally not “tax dependants” under tax law, and so nominating them may not be as tax effective unless the child concerned is financially dependent upon you or they are in an interdependency relationship with you.

Q14. Will my re-marriage, a change of spouse or the death of my nominee affect an earlier death benefit nomination I have made?

Yes. The death benefit nomination will no longer be effective. The trustee will then decide who receives these benefits unless you make a new nomination.

Q15. Will a binding nomination lapse and require renewal?

Under the superannuation regulations, death benefit nominations must be renewed every three years. However, the regulations imposing the three-year renewal are not applicable to SMSFs. However if the rules of your fund say that the nomination lapses after three years then that is what happens regardless of whether the regulations would have otherwise applied or not.

If it is clear to you that the rules of your fund require your nomination to be renewed, you should have a regime to check and renew the nomination as it is possible that the trustee may be influenced or bound by an outdated death benefit nomination that neither you nor the trustee want at the time of your death.

Q16. Must the nomination be witnessed by two independent witnesses?

Binding nominations in SMSFs operate under different rules compared to nominations in public offer or industry funds.

Usually, binding nominations made in relation to public offer and industry funds must be witnessed by two independent witnesses (in the manner in which a Will must be witnessed), and cannot operate for more than three years after they are signed.

Binding nominations in SMSFs are not necessarily subject to the two witness, or the three-year duration requirements. Those requirements only apply if the SMSF’s rules say they apply..

As a matter of documentary prudence the member making the binding nomination should initial the foot of each page of the nomination, and the signing by the member of the binding nomination should be witnessed by an independent adult witness.

Q17. Are binding nominations non-lapsing?

Binding nominations in SMSFs do not have to be renewed every three years unless the fund's rules say so.

Q18 Can I revoke a binding nomination?

Yes. A binding nomination is binding on the trustee not on you. A death benefit nomination or a revocation of a nomination must be in writing, appropriately signed and witnessed and dated, and given to and accepted by the trustee of your SMSF during your lifetime.

You can revoke a binding nomination at any time. It cannot be revoked after your death.

Q19. If I give a new nomination will this automatically revoke any earlier nomination I have made?

Yes. However for complete certainty each nomination should state that it revokes all prior nominations.

Q20. Does the nomination form signed by me have to be witnessed?

Only if the fund's rules say so. The requirement for witnessing in the superannuation regulations does not apply because those regulations do not apply to SMSFs.. It would however be prudent to have at least one independent witness, who will not benefit from the nomination and is at least 18 years old. The witness should not be a fellow trustee or director of the corporate trustee of the fund (if any).

For any other SMSF, you must check the specific requirements under its trust deed to see if the nomination form has to be witnessed and by whom.

Q.21. Can my attorney under power sign my death benefit nomination?

Yes, provided

- (a) the rules of the fund don't prevent it, and
- (b) the power of attorney appointing that attorney is an enduring power of attorney and does not limit the attorney's powers in that regard.

Q.22 Can my enduring attorney under power change my death benefit nomination without my consent?

Yes, provided

- (a) the rules of the fund don't prevent it, and
- (b) the power of attorney appointing that attorney is an enduring power of attorney and does not limit the attorney's powers in that regard.

It is important that you only choose an attorney in whom you have absolute trust to look after your interests.

If you do not wish your attorney to have this power, then you may wish to consider amending the power of attorney to remove the power to change your death benefit nomination or limit it in some way.

Q.23. Can't I just do all this in my Will?

No. Your superannuation interests are not part of your estate as such because they are controlled by the trustee of your superannuation fund. You therefore need a formal death benefit nomination to deal with them. Of course if you nominate your estate as the nominee then your super benefits can be transferred to your estate following your death and your executor will then be able to deal with them pursuant to your Will. Whether this would be an appropriate course of action depends on a number of factors in relation to which you should seek advice.

Q24. Must I have a separate nomination in respect of each SMSF?

Yes. As the rules relating to binding nominations may be different in each SMSF, a nomination which satisfies the requirements of one SMSF may not satisfy the requirements of another SMSF. Each binding nomination is fund-specific.

Consequently you must have a separate binding death benefit nomination in respect of each superannuation fund in which you are a member including each SMSF. While the binding nominations must be fund-specific they can, if you wish, and subject to the governing rules, be identical as to their terms.

Q25. If my pension is reversionary, how does this affect my binding death benefit nomination?

The question of whether a binding death benefit nomination does or does not override a reversionary pension has been contentious. It is very dependent on the rules of the fund but often those rules are silent on the point. Check the rules first and then if necessary seek advice from a professional SMSF expert if the issue is important to you.

For more information or assistance with death benefit nominations, and estate planning generally, please call SUPERCentral on (02) 8296 6266 or Townsends Business & Corporate Lawyers on (02) 8296 6222.